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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 100

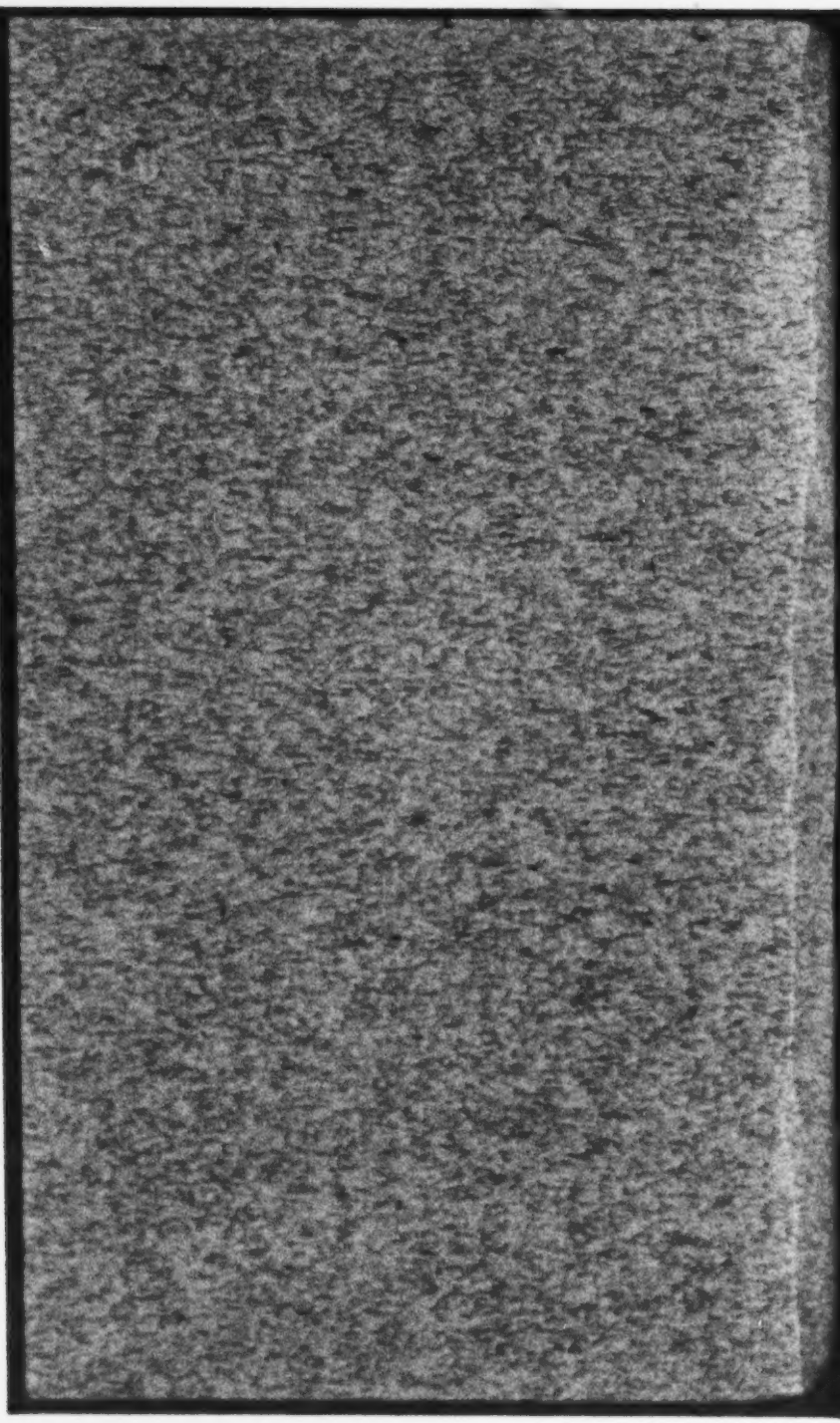
MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

MARY I. ABBY, Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

EDWARD J. WHITE,
JAMES F. GREEN,
MERRITT H. HAYDEN,
Attorneys for Petitioner.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No.

MISSOURI PACIFIC RAILROAD COMPANY,
PETITIONER,

vs.

MARY I. AEBY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioner, Missouri Pacific Railroad Company, presents this its petition and prays that a writ of certiorari may be granted, directing the Supreme Court of the State of Missouri to certify to this Honorable Court for its review and determination the case of Mary I. Aeby, respondent, *v.* Missouri Pacific Railroad Company, appellant, being cause No. 25385 of the October, 1925, term—1926 call—of said Supreme Court,

and for reasons of this application and petition your petitioner respectfully shows to this Court that on the 17th day of November, 1922, Mary I. Aeby, a resident of the State of Arkansas, instituted this suit in the Circuit Court, City of St. Louis, Missouri, against your petitioner, wherein she sued for damages for personal injuries alleged to have been sustained by her while in the employ of your petitioner as a station agent at the village of Magness, in said State of Arkansas.

During the pendency of said suit in the Circuit Court, City of St. Louis, Missouri, respondent filed an amended petition alleging that at all times mentioned therein your petitioner was engaged in commerce between different States of the United States, and that at the time of her injury she was employed by petitioner in interstate commerce. It was then alleged that on and prior to the 13th day of January, 1921, respondent was employed at Magness, Ark., as station agent for your petitioner; that it was her duty to go from the station to the trains for the purpose of carrying on the business of petitioner, and that in doing so she was required to pass over a platform extending from the station building to the tracks of your petitioner; that on said 13th day of January, 1921, in the early morning, before it was fully light, she delivered to a certain train and received from said train express, mail, and messages, and while returning from said train to the station she fell upon the platform.

It was further alleged in said petition that your petitioner was guilty of negligence, in that:

(1) Said station platform was not lighted.

(2) Said platform was covered with snow, sleet, and ice and was so slick that one was liable to slip thereon, and was not level.

(3) That the surface of said platform was composed of chat and fine gravel, so loosely put together that depressions, holes, and drains would form in it, leaving the surface uneven, slanting, and with ridges and irregular places appearing thereon.

(4) That petitioner did not maintain troughs or gutters on its depot building, but allowed the water falling on the roof of said building to fall on the chat or gravel platform in front of the door and caused said chat and gravel to become loose, so that a depression like a gully or trough formed in front of the depot door.

(5) That the water falling on said depot and said platform flowed toward the depression in front of said door and cut a depression or ditch in front of said door and around the corner of said depot, which ditch or depression had sharp, slanting sides, and also slanted downward toward the end of the depot, and that in cold weather, when rain, snow, and sleet fell, ice formed in the bottom and on the sides of said ditch or depression and formed a slick, ice-covered, and irregular surface, rendering it dangerous for a person to step into or upon said ditch or its sides.

It was further averred in said petition that at the time of her injury the depot platform was dark and unlighted, and that respondent had no knowledge that said depot platform was in the unsafe and dangerous condition aforesaid, nor could she have knowledge of such fact by the exercise of ordinary care, and that in passing over said platform on said date she stepped upon and into said ditch or depression and upon the irregular surface of same, which was then covered by a coating of ice, snow, and sleet, and fell violently to the platform, resulting in the injuries complained of.

Answer of Petitioner.

Your petitioner further shows that it filed an answer to respondent's said petition admitting that petitioner was engaged in commerce between the different States of the United States, and that respondent was employed by petitioner in interstate commerce. All other allegations of the petition were put in issue by a general denial thereof. The answer further pleaded contributory negligence on the part of respondent, and, further, that all of the conditions existing at said station and in and upon said station platform with respect to either light or lack of light, to the alleged depression or ditch in said platform, and the alleged slant in the sides thereof, and with respect to the snow, sleet, or ice, if any, thereon, as well as whatever dangers, if any, existed as the result of said alleged conditions, were open and obvious to any one, and especially respondent, while passing

over said platform, and were either known to and appreciated by respondent, or by the exercise of ordinary care on her part could have been known to and appreciated by her, for which reason it was further averred that respondent assumed the risk of injury incidental thereto or likely to result therefrom.

Your petitioner further shows that upon the trial of said cause respondent recovered a judgment in the sum of fifteen thousand dollars ($15,000), from which an appeal was taken to the Supreme Court of the State of Missouri; that on the 11th day of January, 1926, said cause was argued and submitted to said supreme court; that on the 5th day of April, 1926, said supreme court handed down its decision in said cause, affirming the judgment of the trial court (Rec., p. 157 and pp. 157-171); that thereafter, and within the time provided by the rules of said court therefor, and on the 14th day of April, 1926, your petitioner filed therein its motion for a rehearing of said cause (Rec., pp. 172-173); that on the 28th day of May, 1926, said motion for rehearing was by the Supreme Court of Missouri, by order duly entered of record, overruled, whereupon said judgment became final (Rec., p. 175), and that this application is filed and made to this Court within three months after the entry of said final judgment.

Your petitioner further shows that the Supreme Court of Missouri consists of two divisions; that said cause was heard and decided by Division No. 2 of said court, and that after the decision of said court affirming the judgment of the trial court and on, to wit, the 14th day of April, 1926, your petitioner filed in said

court its motion for a transfer of said cause to the Supreme Court of Missouri *en banc*, in order, if possible, that said cause might be determined by all of the judges comprising both divisions of said Supreme Court of Missouri (Rec., p. 174), and that on the 28th day of May, 1926, your petitioner's said motion to transfer said cause to the court *en banc* was by order of court duly entered of record, overruled (Rec., p. 175), and petitioner states that there is no other proceeding, under the laws of Missouri or under the rules of said supreme court, of which petitioner can take advantage for a further consideration of this case by said court, and this judgment is now final.

Your petitioner attaches to and files with this application a certified transcript of the proceedings had in said Supreme Court of Missouri and a certified copy of the abstract of the record in said court.

Your petitioner also files herewith and respectfully asks to have considered in connection with this application, as if included herein, a brief in support thereof.

Your petitioner further shows that the facts upon which it relies in this application are all established by the uncontroverted testimony of respondent.

At the time of her injuries she was about 34 years of age. She had lived during most of her life within 20 miles of the station on your petitioner's line of railroad known as Magness, Ark. She first entered the employ of your petitioner as ticket agent at Morefield on March 20, 1919, or nearly two years prior to her injury, where she worked until July 2, 1920, when she

began work for petitioner as station agent at Magness, Ark., a town of 400 people (Rec., p. 17).

Her duties as station agent at Magness were to do the book work, sell tickets, and handle the express and freight work (Rec., p. 17). At the time of her injury, there were four trains which passed that station. One passenger train passed there, northbound, at 6:18 in the morning and one passenger train, southbound, at 6:41 in the evening; then at 8:50 in the morning and at 12:38 p. m. there were two local, or mixed, trains (Rec., p. 18).

The station-house proper at this place was a small wooden building, various pictures of which appear in the record. The station platform was composed of chat or small gravel. There was evidence tending to establish that when it rained the rain, falling from the roof of the station and "the passage of people in and out of the station," would cause a depression, or small ditch or drain to wear in the chat comprising the platform (Rec., p. 19); that this ditch or depression extended across that part of the platform in front of the door leading into the station (Rec., p. 19). A reference to the pictures appearing in the record at pages 128 and 129 will show a projection built over the top of the door leading to the station, and also, immediately in front of the steps to the doorway, will be seen some boards, which are referred to in the record as a grain door (Rec., p. 113). These boards are laid over that portion of the platform where it is contended the depression, or ditch, formed. The grain door was laid in the position shown in the exhibit some time after this

accident, and the projection at the top of the door was placed there some time after the accident (Rec., p. 114).

The condition with reference to the falling of rain from the roof of the station and with reference to the wearing in the chat platform of this depression or ditch existed whenever it rained, from the time when respondent began work at this station, on July 2, 1920, until the date of her injury, in January, 1921 (Rec., pp. 55 and 70). During that time respondent was practically in sole charge at this station (Rec., p. 71).

When she first entered the service at this place, respondent had a caretaker by the name of Puckett, who was to assist her at the station. She discharged Puckett on orders of the superintendent in August, 1920, and employed one Garner, who was to receive the sum of $75 a month as caretaker, but respondent carried Garner's name as helper and did his work herself and received his pay (Rec., p. 34). During the time that she was employed at this station prior to her injury respondent observed that when rain fell from the roof of the station it would first make a ditch or depression in front of the station, and that later the chat would absorb the water or it would run away. She had often noticed that condition (Rec., p. 35). She kept a book in which she entered a record of weather conditions at that station while she worked there (Rec., pp. 36 and 37).

Your petitioner further shows that on the night preceding her injury respondent met the train, southbound, due at Magness at 6:41 p. m.; that she received

the mail from that train and took it to the village post office; that thereafter she returned to the station, where she remained all night (Rec., pp. 37-38); that at the time that she returned to the station the platform was perfectly dry and there was no accumulation of either water, snow, or ice thereon (Rec., p. 38); that during the night it first rained, then sleeted, and then snowed (Rec., p. 38); that she arose the next morning and stepped out of the station and proceeded to pull the truck from its position at one end of the station out to the edge of the platform next to the railroad track preparatory to meeting the train due there at 6:18; that she knew that it had sleeted during the night; that she knew there was snow all over the platform and all over the village as far as could be seen from the station as soon as she stepped out of the station and before she was injured (Rec., pp. 39 and 40); that when she attempted to move the truck she discovered that it was covered with sleet, and that there had been freezing weather during the night (Rec., p. 52); that she pulled the truck out to the edge of the platform and placed it in its proper position without any mishap, and while walking from the edge of the platform back to the station and when she had reached a point near the steps leading to the station, she slipped on the side of the depression and on the snow or ice which was in the depression and which had accumulated during the night, and fell, sustaining the injuries of which she complains (Rec., p. 47).

The testimony of respondent established that during all the time that she was moving the truck and walking

across the platform she walked on snow, and that she knew that the platform was covered with snow (Rec., pp. 39 and 40).

The testimony of respondent, found on pages of the record already referred to, establishes that she was of full age and experience; that she worked at this station from July 2, 1920, to January 13, 1921; that the construction of the roof of the station and of the platform was exactly the same on the date of her injury as it was when she began work there; that all of the conditions of the platform with respect to the depression made by the rain falling from the roof, and of people passing in and out of the depot, and with the exception of the presence of snow and ice therein, were the same at the time of her injury as they were when she began work at this station; that many times prior to this date when it rained she had observed that a depression would form, and that water would first accumulate therein and be later absorbed by the chat. She was thoroughly familiar with these facts. She knew that on the night preceding her injury there was no accumulation of water, snow, or ice on this platform, but, on the contrary, it was perfectly dry at as late as nine or ten o'clock on that night. She knew before she stepped out of the station in the morning that it had rained during the night. She knew when she stepped out of the station that the steps and platform and the entire village were covered by snow. She knew when she first attempted to move the truck, which was before her injury, that it had sleeted during the night; that the water which had fallen had frozen, and that the

depression in which, first, the water had frozen and, later, the ice had formed was some two to four feet square and two or three inches deep (Rec., p. 68).

Your petitioner further shows that by the pleadings and the testimony in said cause there were, and are, presented, among others, three principal questions, all arising under the act of Congress known as the Federal Employers' Liability Act, namely:

First. Whether the allegations in respondent's petition and the facts established by the testimony bring the case within the provisions of the Federal Employers' Liability Act, more particularly whether a station platform is embraced within that portion of said act which provides for the recovery of damages for injuries resulting, in whole or in part, from a defect or insufficiency due to the negligence of the carrier in its "cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Second. Whether respondent assumed the risk of injuries likely to arise from the conditions existing at the time and place of her injury as herein set forth.

Third. Whether the injuries sustained by respondent were solely due to her own primary negligence—not to her contributory negligence.

Your petitioner further shows that the accident which resulted in respondent's injuries occurred when she had completed the act of placing the truck at the edge of the station platform and while she was walking back across the platform to the station, presumably for

her own convenience and while she was not performing any act of service; that this suit was brought under the act of Congress known as the Federal Employers' Liability Act, which provides that a common carrier by railroad, while engaged in commerce between the States, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce—

> "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, *or* by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Your petitioner further shows that it was neither alleged nor contended by respondent that her injury resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, but that, on the contrary, respondent sought to bring her case within the second clause of the statute just quoted and following the word "or"; that your petitioner contended before, and argued to, said Supreme Court of Missouri (1) that respondent's injury did not result from any defect or insufficiency due to petitioner's negligence in respect to any of the appliances or equipment mentioned in said statute; (2) that the only word in said statute which would cover a station platform, such as is involved in this case, was the word "works," and (3) that this particular station platform was not a part of the works of your petitioner.

Your petitioner further shows that said Supreme Court of Missouri held that this case was within the provisions of said clause of said act, and, in so holding, said Supreme Court of Missouri has decided a Federal question of substance not heretofore determined by this Court and has decided it in a way probably not in accord with applicable decisions of this Court.

Your petitioner further shows that the Supreme Court of Missouri in deciding this case held that respondent did not assume the risk of injury arising from the conditions which the testimony establishes existed at the time of her injury; that in so holding the Supreme Court of Missouri referred to, but failed and refused to apply and follow, the law as declared by this Court upon the question of assumed risk in cases brought under the Federal Employers' Liability Act; that, on the contrary, the Supreme Court of Missouri applied to the facts of this case the rule of assumed risk as announced by the Supreme Court of Missouri in cases not based upon the Federal Employers' Liability Act, and in so doing used the following language (Rec., p. 164):

> "The evidence tends to show that the defendant was negligent in the construction and maintenance of the platform, and that such negligence was the proximate cause of plaintiff's injuries. 'The rule is firmly established in this State that the servant never assumes the risk of injury created by the negligence of the master.'"

Your petitioner further shows that in so holding the Supreme Court of Missouri has decided a Federal question of substance in a way not in accord with the applicable decisions of this Court, and that the decision of said Supreme Court of Missouri fails to follow and is in conflict with the law as declared by the decisions of this Court in the following cases:

Seaboard Air Line Railway *v.* Horton, 233 U. S., 492.

Jacobs *v.* Southern Ry. Co., 241 U. S., 229.

Chesapeake, etc., Ry. Co. *v.* De Atley, 241 U. S., 310.

Chesapeake, etc., Ry. Co. *v.* Proffitt, 241 U. S., 462.

Erie Railroad Co. *v.* Purucker, 244 U. S., 320.

Boldt *v.* Pennsylvania R. R. Co., 245 U. S., 441.

Prior *v.* Williams, 254 U. S., 43.

Your petitioner further shows that the Supreme Court of Missouri failed, or refused, to hold that the injuries suffered by respondent were solely due to her own primary negligence with respect to the manner in which she walked across this platform and with respect to her failure to see and avoid slipping and falling upon the ice or upon the sides of the depression or ditch in which the ice was; that, on the contrary, said Supreme Court of Missouri decided that if respondent was guilty of any negligence, such negligence merely contributed to her injury and did, therefore, not bar her right to recover. Your petitioner shows that in so holding the Supreme Court of Missouri has decided a

Federal question of substance in a way not in accord with the applicable decisions of this Court, and that said decision of said Supreme Court of Missouri fails to follow and is in conflict with the law as declared by the decisions of this Court in the following cases:

Great Northern Ry. Co. *v.* Wiles, 240 U. S., 444.
Davis *v.* Kennedy, 266 U. S., 147.
Frese *v.* C., B. & Q. R. R. Co., 263 U. S., 1.

WHEREFORE, in view of the premises, your petitioner prays that this Honorable Court will grant its writ of certiorari, directed to the Supreme Court of Missouri, requiring that the complete record in said cause in said court and its judgment herein be certified to this Court, and that this Honorable Court will thereupon proceed to correct the errors complained of and to reverse the judgment of said Supreme Court of Missouri and to give to your petitioner such other and further relief as the nature of the *case* may require and to the Court may seem proper in the premises.

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,
By EDWARD J. WHITE,
JAMES F. GREEN,
MERRITT U. HAYDEN,
Its Attorneys.

STATE OF MISSOURI,
City of St. Louis, ss:

Merritt U. Hayden, being duly sworn, says that he is one of the attorneys for the above-named petitioner, Missouri Pacific Railroad Company, and that he has knowledge of the matters and things set forth in the above petition and of the conduct of proceedings had in the above-entitled case, and that he verily believes that the facts as stated in said petition are true.

MERRITT U. HAYDEN.

Subscribed and sworn to before me this 23d day of June, 1926. My commission expires the 28th day of June, 1929.

[SEAL.] GEO. W. COLLINS,
Notary Public.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No.

MISSOURI PACIFIC RAILROAD COMPANY,
PETITIONER,

vs.

MARY I. AEBY, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

This Case is Not Within the Operation of the Act of Congress Known as the Federal Employers' Liability Act.

Whether the allegations of respondent's petition plead a case within the provisions of the Federal Employers' Liability Act may well be doubted, but we contend that the facts established by the uncontroverted evidence certainly fail to bring the case within the operation of that act.

In the second paragraph of respondent's amended petition (Rec., p. 6) there is an averment that at all the times mentioned in said petition defendant was engaged in commerce between different States of the United States, and that at all such times, as well as at the time of her alleged injury, respondent was employed by petitioner in interstate commerce, to wit, as a station agent at Magness, in the State of Arkansas.

This allegation was admitted by petitioner, as it correctly stated the facts. Petitioner was engaged in interstate commerce and the particular train involved in this suit was a train which was operated between the city of Newport, Ark., and the city of Joplin, Mo., and, so far as her general duties were concerned as station agent, we presume it will be held that respondent was employed in interstate commerce.

This petition further alleges (Rec., p. 7)—

> "That in the discharge of her duty to defendant she did go to said station and delivered to said train and received from said train express, mail, and messages, such as said train delivered and received at said station, and while returning from said train to said station she fell upon the platform," etc.

The duty mentioned in this allegation may have been true as a general proposition, but the testimony of respondent herself, to which we shall more particularly direct attention hereinafter, discloses that she did not deliver any express, mail, or messages to this train on the morning of the accident and was not

injured while returning to the station after having either delivered to, or received from, said train express, mail, and messages. It appears from the evidence (Rec., p. 47) that some mail or express was placed on this truck upon arrival of the train, but a companion of respondent's carried same into the station in her hands. The truck was not moved away from the edge of the platform. At the moment of her injury she was not engaged in the performance of any duty for petitioner, and we contend that the case is not brought within the provisions of the Federal Employers' Liability Act, either by the allegations in respondent's petition or by the facts proved.

In accordance with the practice obtaining in Missouri, petitioner filed a general demurrer to this amended petition, the sole ground of which was that said petition "did not state facts sufficient to constitute a cause of action against petitioner" (Rec., p. 9). Nowhere in this petition is there any averment that respondent's injury resulted by reason of any "defect or insufficiency" due to petitioner's negligence in its "cars * * * works * * * or other equipment." The petition merely avers negligence in reference to certain conditions of the station platform.

The act of Congress known as the Federal Employers' Liability Act creates two rights of action for damages for injuries suffered by employees of a carrier engaged in interstate commerce, depending upon the nature of the cause of the injuries, namely: First, if the injury results in whole or in part from the negli-

gence of any of the officers, agents, or employees of such carrier; or, second, by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

There is no contention in this case that respondent's injury was due to negligence of any of the officers or agents or employees of petitioner. If the facts in this case bring it within the operation of this act, it is because of the second right of action given to respondent. Under that clause of the act the injury must have resulted from some defect or insufficiency due to the carrier's negligence in the appliances mentioned in the statute. A station platform is not specifically mentioned therein, nor does any word appear there which covers a station platform, unless it be the word "works."

The act known as the First Employers' Liability Act, or that of June 11, 1906, which was declared unconstitutional by this Court, did not, as to the second right of action, contain the words "boats, wharves, or other equipment," but included after the word "roadbed" the words "ways or works." It will be observed, however, that the word "ways" does not appear in the act now in force. Of course, it could hardly be successfully argued that a station platform was not a "way" of ingress and egress to and from the station or to and from the trains, but if a station platform comes within the enumeration of the present act it is because of the use therein of the word "works," and it is our contention that that word as used in the

statute pertains to structures owned or operated by the carrier, similar to machine shops, round-houses, or others of like character, and was not meant to include a station platform.

In volume 10 of the Century Dictionary, at page 6976, the word "work," a noun, is defined to be—

> "An establishment for manufacturing or for performing industrial labor of any sort; generally in the plural, including all the buildings, machines, etc., used in the required operations; as iron works—hence the plural is used as a collective singular, taking then a singular article as, a large glass works in the town."

One of the obvious purposes of this act was to create a right of action for damages for injuries suffered by those employed in work for railroad companies, such as in the operation of trains, by reason of which such employees were subjected to the characteristic hazards incidental to the business of operating a railroad. In the respects by which this act changed the common law upon the same subject the legislation was, and is, somewhat drastic. It creates new causes of action and destroys certain common law defenses in bar of such rights of action, and we submit that, when the character and purpose of this act are considered, it was not the intention of Congress to provide either a new cause of action or abolish certain common law defenses in bar in favor of one who was injured by simply walking across a station platform, even though the owner of the station platform was an interstate carrier and

the person injured could be said to be generally employed by such carrier in interstate commerce.

We have been able to find only one case in which this question has been considered, and that is the case of

Elliott v. Payne, 293 Mo., 591,

decided by the Supreme Court of Missouri, wherein it was held that where a locomotive fireman was injured in alighting from his engine on a railroad-station platform, which was in a defective condition, the case did not come within the Federal Employers' Liability Act. In that case, as in this, the alleged defective condition of the platform permitted an accumulation of water, snow, and ice thereon. The deceased fireman, in attempting to alight from his engine, slipped and sustained fatal injuries. Suit was brought by the administrator of his estate under the Federal Employers' Liability Act.

In deciding the case, the Supreme Court of Missouri directed attention to the fact that the word "ways," which appeared in the first Federal Employers' Liability Act, was not used in the present act. The court there said:

> "Reverting to the petition it will be noted that the negligence charged is that of the 'defendant' and not as to defendant's officers, agents or employees. The action is under the latter clause of section 1 of the Federal Employers' Liability Act, which reads: 'Or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or

other equipment.' Query: Does a depot platform fall within this enumeration? The statutory negligence, or neglect of duty, is as to the things mentioned, and none other. If a platform falls within the things named, then neglect of duty as to the platform gives actionable negligence; if not, then there is no negligence in the case, and plaintiff must fail in her action under this statute. * * *

"However writers and courts may differ in their views as to just what is covered by this statute, and as to whether the particular negligence falls under the first or second class of negligent acts named in the statute, it must be clear that the statute undertakes to change and modify the common law. In a sense it creates liability where there was none at common law. It destroys defenses which were recognized at common law. It makes that negligence of the master which was not his negligence at the common law. These radical changes are by statute, and it is to the statute that we must go to determine the master's negligence in a case brought under the statute. Suppose the statute (in its second specification of negligence) had stopped with the words 'cars, engines, appliances, track, roadbed,' could it be said that a defective station platform would be an actionable negligent act of a defendant under the statute? We think not, because it would not fall within any of the terms thereof. If not, then there could be no action under the Act of 1908 and its subsequent amendment in 1910 for such neglect or negligence. Congress, as ruled by the courts, had the power to pass the law, and of course had the right to limit the things, defects in which

should constitute negligence. Congress could have limited the law to engines, cars, tracks and roadbed. If it had, defects in appliances other than those named would not be actionable under the statute. For action thereon the party would be relegated to his common-law rights. In other words, the right to sue under this act is limited to the things mentioned in the law, and if a depot platform, maintained chiefly for the general public, rather than the employees of the railroad, does not fall within the act, then there was no actionable negligence. We have indicated above that a depot platform would not fall under the terms, 'cars, engines, tracks, roadbed or appliances.' The ordinary meaning of these words is well understood. The remaining words used are 'machinery, works, boats, wharves or other equipments.' It is clear that a depot platform would not fall under the head of either 'machinery,' 'wharves,' or 'boats,' so that we have left the two words 'works' and 'other equipments.' * * *

"If a depot platform falls within the terms of the Federal act at all, it must be that the word 'works' as used therein includes it. If not, it is beyond the purview of the statute."

The court then directs attention to several cases in which the word "works" has been construed, reaching the conclusion that the word clearly has reference to working places other than the tracks, roadbed, and their incidents, such as repair shops, engine-houses, railway yards, and switch-yards.

The court also discussed the meaning of the word

"ways," which appeared in the first act, but was "significantly" dropped from the second act, saying:

> "A depot platform, so far as its general use by the public is concerned, is largely a passage way from the outside world to the trains of the company, and from those trains to places outside of railroad property. In a very limited sense it may be a working place for certain classes of employees. Those employees whose duties require them to unload passengers, baggage or freight might say that it was a working place, but to other employees it would be a mere way of ingress and egress."

The facts are uncontroverted as to what occurred immediately preceding respondent's injury. Respondent had spent the night preceding her injury in this station. On the morning of the accident she came out of the station for the purpose of moving a truck, which was at the west end of the station (Rec., p. 22). She stepped off the steps leading from the station and went over to the truck, which was about ten feet away. She then moved the truck out to the edge of the platform nearest the railroad track (Rec., p. 23). After having thus placed the truck, which completed her duties so far as the handling of the truck was concerned until the arrival of the train, she proceeded to walk back across the platform for the purpose of entering the station (Rec., p. 47). If the word "ways" appeared in the present statute, this platform might be said to be embraced within its terms, and there would probably be no difficulty in reaching the conclusion that while

returning across the platform to the station, as respondent was doing immediately preceding her injury, she would be within the provisions of this act, if injured because of any defect or insufficiency in the platform due to petitioner's negligence; but we submit that this platform was not a part of the "works" of petitioner, and if it was not, then petitioner is not responsible under this act for any defect or insufficiency in the platform, and the rights of the parties are to be determined by the common law of the place where the accident occurred, and not by the provisions of the Federal act.

Respondent Assumed the Risk.

If the facts in this case bring it within the provisions of the Federal Employers' Liability Act, then certain principles well settled by the decisions of this Court are applicable, namely: (1) The provisions of that act, in so far as they may be held applicable to the facts in this case, supersede the State laws, which might otherwise determine the rights of the parties to this suit; (2) the common law, by which the question whether or not respondent assumed the risk is to be determined, is the common law declared and enforced by this Court, and not that declared and enforced by the State courts, and (3), under these decisions of this Court, respondent assumed the risk, not only of those injuries ordinarily incidental to her occupation, but also of those injuries which were likely to result from conditions arising from petitioner's negligence, which respondent

knew and appreciated, or which were so obvious that, as a reasonably prudent person, she would have known and appreciated.

This act was considered by this Court with respect to the question of assumption of risk in the case of

Seaboard Air Line Ry. Co. v. Horton, 233 U. S., 492; l. c., 503-4,

It was there held that section 4 of said act, in eliminating the defense of assumption of risk in the cases indicated, "quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action."

The court in that case called attention to the distinction between the defenses of contributory negligence and assumption of risk, and then said:

> "Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under

the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this court." (Cases cited.)

As was said by this Court in the later case of

Boldt, Adm., *v.* Pennsylvania R. R. Co., 245 U. S., 441; l. c., 446:

> "The risk held to have been assumed in the Horton case certainly arose from negligence of some officer, agent or employee; and if the negligence of all these should be excluded in actions under the Employers' Liability Act, it is difficult to see what practical application could ever be given in them to the established doctrine concerning assumption of risk."

In the Horton case it was further said:

> "But by the common law, with respect to the assumption by the employee of the risk of injuries attributable to defects due to the employer's negligence, when known and appreciated by the employee and not made the subject of objection or complaint by him, it is quite immaterial whether the defect existed when the appliance was first placed in his charge, or subsequently arose."

This same rule has been many times announced in this Court since the Horton case was decided in opinions written by various members of the Court. Among

the cases in which the rule has been declared are those of:

Jacobs *v.* Southern Railway Co., 241 U. S., 229.
Chesapeake & Ohio Ry. Co. *v.* De Atley, 241 U. S., 310.
Chesapeake & Ohio Ry. Co. *v.* Proffitt, 241 U. S., 462.
Erie R. R. Co. *v.* Purucker, 244 U. S., 320.
Boldt *v.* Pennsylvania R. R. Co., 245 U. S., 441.
Pryor *v.* Williams, 254 U. S., 43.

In the Jacobs case (241 U. S., 229) the plaintiff was engaged with a crew in shifting cars in the company's yard. He descended from the engine to get drinking water for himself and the engineer. He returned with a can of water, to mount the engine and tripped on a pile of cinders and fell under the engine. He had often attempted to board engines while they were moving. The cinder pile was about 18 or 24 inches deep. The cinders were right up against the rail and sloped from the rail up. He testified that he knew that the cinders were there, but did not know that it was dangerous, and that at the moment of his injury he had forgotten that they were there. In holding that plaintiff was not entitled to recover, this Court said:

> "He admitted a knowledge of the 'material conditions' and it would be going very far to say that a fireman of an engine who knew of the custom of depositing cinders between the tracks, knew of their existence, and who at-

> tempted to mount an engine with a vessel of water in his hands holding 'not over a gallon' could be considered as not having appreciated the danger and assumed the risk of the situation because he had forgotten their existence at the time and did not notice them."

In the case of

Pryor *v.* Williams, 254 U. S., 43,

the plaintiff was injured while using a defective claw bar. To discover the defect required an examination of the under side of the tool. Plaintiff testified that in obeying the order of the foreman he did not pause to make such inspection, but used the tool without any but a casual inspection of its top surface, which did not reveal the defect. The case arose in Missouri. In the trial court plaintiff recovered a judgment, from which an appeal was taken to the Kansas City Court of Appeals, where the judgment was reversed, but on a certificate of one of the judges of that court the case found its way to the Supreme Court of Missouri. The latter court held in that case, as it held in this, that the failure to furnish a reasonably safe claw bar was negligence on the part of the employer, and that under the rule obtaining in Missouri the use by plaintiff of the claw bar in its defective condition was one of contributory negligence, which was not a bar under the Federal statute, and the defense of assumption of risk was not available in bar of plaintiff's right to recover.

Upon the case reaching this Court the judgment of the Supreme Court of Missouri was reversed. This Court held, in effect, that the case was to be determined by the rule upon the question of assumption of risk as declared by this and other Federal courts, and not by the rule obtaining in the State courts.

In view of the law as declared in these decisions and assuming, for the purpose of this discussion, that the case comes within the provisions of the Federal Employers' Liability Act, we submit that respondent assumed the risk of injury due to the condition of the station platform complained of, even though, as the testimony may be said to have tended to establish, such condition existed as the result of petitioner's negligence.

In this proceeding petitioner relies upon and will refer only to the testimony given by respondent herself. As we have stated in the application, respondent was about 34 years of age at the time of her injury. She entered the employ of petitioner at this station on July 2, 1920, and remained continuously in its employ at that station until the 13th of January, 1921, at which time she was injured. During all of that time, whenever rain fell, there was a depression or drain in front of the steps (Rec., p. 22). In response to the question, asked her by her own counsel, as to the cause of this depression or drain, she answered: "By the passage of people passing in and out, and also by the water running in front of the door" (Rec., p. 19). Respondent further testified on her direct examination that she had observed rains before the day of the accident on the plat-

form; that she had observed that water would run before the door; that the water stuck into the platform, and that the platform absorbed the water (Rec., p. 22).

On cross-examination she testified that from July, 1920, until January, 1921, rain had fallen on several occasions in that vicinity; that she had observed that when it fell the rain fell from the roof and made this ditch or drain in front of the station; that when the rain would first fall the water would accumulate in front of the station, and then later the ditch would absorb it or it would run away; that she had often noticed this condition whenever it rained (Rec., p. 35).

Again, she testified that the depression or ditch was before the door when she went to work at this station; that it remained there all that time, and that the station platform in other respects, except as to the snow and ice, was in the same condition at the time of her injury as it was when she went to work there in July, 1920 (Rec., p. 55).

On recross-examination, respondent testified that this depression got wider and deeper from July, 1920, until January, 1921; that it wore out the last month; that the more rain fell the deeper it would wear (Rec., p. 68); that the rain had washed it out some the night before she was hurt; that the rain washed it deeper that night (Rec., p. 69). And again, on recross-examination, she testified that every morning when she was on duty she moved the truck out to the north edge of the platform next to the tracks to meet the morning train (Rec., p. 69); that she would move the truck out and then go back to the station and wait for the train;

that every morning, when she would go back from the truck to the station, she had to step over this ditch or drain; that she saw water in the drain, and that on occasions, when there was water in the drain, she stepped across it onto the steps (Rec., p. 70). She further testified that the same conditions with reference to light around the station had existed there during all the time that she worked there as existed on the morning of her injury; that there never were any other lights there than what she had that morning (Rec., p. 70).

On the night before her injury, respondent testified she met the evening train, received the mail from it, took the mail to the post office, and returned to the station, where she spent the night; that this occurred about 9 o'clock; that thereafter she was not out of the station again that night; that when she entered the station, after returning from the post office, there was no rain or snow or sleet anywhere around there; that about 10 o'clock it began to rain. She knew it was raining. That she arose about 6 o'clock on the morning of the 13th and went out of the station (Rec., p. 38); that she then noticed there were about two or three inches of snow on the steps and as far as you could see from the depot; that the snow was all over town; that the two steps leading from the station were covered with snow; that, as she stepped off the steps to walk to the truck, she walked in the snow (Rec., p. 39); that, arriving at the truck, she discovered that there was snow and sleet on the truck; she saw where it had rained and frozen on the truck before it snowed; she and her companion moved the truck to the edge of

the platform nearest the tracks (Rec., p. 40); that when she came out of the station that morning she knew it was cold and was snowing; that she found out that it had frozen. She first noticed that it had frozen on the truck before she was injured (Rec., p. 52).

With respect to her knowledge of the conditions immediately before the accident, she testified that she did not know the ice was before the door, but that she did know it had sleeted and snowed (Rec., p. 54). She knew the ice had formed on the truck; that it had been cold enough to freeze, and she knew if she stepped on any ice she was likely to slip (Rec., p. 54). Whatever ice was there formed during the night preceding the injury (Rec., p. 54). Respondent was injured while walking from where she had placed the truck to the entrance to the station (Rec., p. 52).

From the testimony of respondent the following facts bearing upon the defense of assumption of risk are deducible:

First. That the depression had existed during all of the period of her employment at this station.

Second. That she was thoroughly familiar with the fact that, when it rained, water would accumulate in this depression.

Third. That she knew it had rained shortly before her injury.

Fourth. That she knew, before she fell, that the weather was cold enough for ice to form on this platform or on objects, such as the truck, placed on the platform.

Fifth. That she knew it had snowed and was snowing.

Sixth. That the size of the depression was such that the ice therein was, according to her estimate, two or three feet square.

Upon these facts, we submit that she could easily have discovered and avoided stepping upon this ice.

The theory of respondent in this case, and the theory upon which the Supreme Court of Missouri held petitioner negligent, was not with respect to the accumulation of ice in this depression, but only with respect to the original construction of the platform and station, which permitted the temporary accumulation of water therein, which cast upon the petitioner the duty of anticipating that, in freezing weather, ice might be formed.

Instead of deciding whether, by applying the rule of assumption of risk as declared by this Court, respondent should be held to have assumed the risk, the Supreme Court of Missouri declared and applied the rule obtaining in that State in actions brought under State law and held that, because it found that petitioner was negligent with respect to the construction of the platform and station, the defense of assumed risk was thereby removed from the case.

At page 164 of the record, the Supreme Court of Missouri said:

> "The rule is uniformly established in this State that the servant never assumes a risk of injury created by the negligence of the master."

while at page 165 of the record the court quoted from its opinion in the prior case of

McIntyre v. Railway Co., 286 Mo., 234; 227 S. W., 234,

in which the same court there said:

> "The Federal courts, in cases arising under the Federal Employers' Liability Act, hold that an employee in entering upon a contract of employment assumes all the risks and dangers ordinarily incident to his employment and risks caused by the employer's negligence, which are obvious and fully known to the employee and appreciated by him, or so plainly observable that he must be presumed to know them."

That court then held that respondent did not know or apprehend that there was ice in the depression under the snow, and that she did not appreciate the danger of stepping thereon nor assume the risk of so doing (Rec., p. 164).

If, as this Court has said, and if the rule is as the Supreme Court of Missouri held it to be in the McIntyre case, the servant assumes the risk caused by the employer's negligence, which are so plainly observable that he must be presumed to know them even though he may not actually know them, then we submit that respondent in this case should have been held to have assumed the risk of injuries arising from the conditions existing at the time and place of her injury. We repeat that she knew that the depression was right where it was, namely, in front of the steps; that it had rained during the night; that, whenever it rained, water accu-

mulated in the depression in front of the steps leading to the station. She knew that it had frozen and that ice had formed elsewhere on the platform. She knew that there was snow on the platform, and we submit that she could easily have ascertained, by the exercise of ordinary care, that this particular depression contained ice, especially if that ice was two or three feet square. It is, perhaps, true that she did not observe the condition of this depression before she fell, but she observed it afterwards and then found that there was snow and ice in it and that it was rough and uneven (Rec., p. 24). And so we submit that respondent should not be permitted to escape the consequences of the application of the rule of assumed risk, as declared by this Court, to the facts established by her testimony, and that, in holding that she did not assume the risk, the Supreme Court of Missouri fell into the same error, which resulted in the issuance by this Court of its writ of certiorari in the case of Pryor *v.* Williams, *supra*, and in the reversal by this Court of the judgment of the Supreme Court of Missouri in that case.

Respondent's Injury was Solely Due to Her Own Negligence, Which was Primary and Not Contributory.

We have already called attention to the testimony given by respondent herself with respect to her actions immediately prior to her injury. She knew of the existence of the depression, and that when it rained water would form therein. She knew that it had rained during the night preceding the injury and she knew as soon as she stepped out of the station in the morn-

ing that it had frozen. She was 34 years of age, and certainly should be held to know that ice was likely to have formed in this depression. She also knew that the ground was covered with snow, and she further knew that whenever there was water in the depression, as she says there always was following a rain, she had to, and did, step over it in order to get into the station. On this occasion, instead of stepping over it, she stepped, or slipped, into it, notwithstanding her estimate that this depression was "something like four or five feet square and twelve inches deep" (Rec., p. 20).

We submit that, to hold that her negligence is not a bar to her right to recover, simply because the suit was attempted to be brought within the provisions of the Federal Employers' Liability Act, as this Court held in the cases of

Great Northern Ry. Co. v. Wiles, 240 U. S., 444;
Davis v. Kennedy, 266 U. S., 147;
Freese v. C., B. & Q. R. R., 263 U. S., 1,

would be a perversion of the statute.

For all of these reasons we submit that the Supreme Court of Missouri erred in its decision in this case and that the writ of certiorari should issue.

EDWARD J. WHITE,
JAMES F. GREEN,
MERRITT U. HAYDEN,
Attorneys for Petitioner.